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IN THE

Supreme Court of the United States

October Term, 1958.

No. 922

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI.

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PETITION FOR CERTIORARI.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Michele Marchese and petitions this Honorable Court for a writ of certiorari, directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgment of that court affirming the judgments of the District Court of the United States, and in respect thereto sets forth as follows:

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1254(1), U. S. Code, and the rules of this Honorable Court. The Judgment of the Court of Appeals was rendered April 15, 1959. Certiorari is being applied for within thirty days thereof.

Opinion Below.

The opinion of the Ninth Circuit has not yet been printed in the reports but is attached hereto as an appendix.

Statutes Involved.

Title 18, Section 371, U. S. Codes:

"371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 1403, Title 18, U. S. C. A.:

Use of communication—penalties.

(a) whoever uses any communication facility in comitting or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

(1) subsection (a) or (b) of section 7237 of the Internal Revenue Code of 1954;

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C. sec. 184a),

shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

(b). For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication. (Added July 18, 1956, Chap. 629, Title II, Sec. 201, 70 Stat. 753.)

Title 21, Section 174, U. S. Codes:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficent evidence to authorized conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, Section 7237, U. S. Codes:

(a) Where no specific penalty is otherwise provided.—Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(b) Sale or other transfer without written order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(c) Conviction of second or subsequent offense.—

(1) Prior offenses counted.—For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 148a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsections (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174);

(B) the Act of July 11, 1941 (21 U.S.C., sec. 184a);

(C) section 9 of the Act of December 17, 1914 (38 Stat. 789);

(D) section 1 of the Act of May 26, 1922 (42 Stat. 596);

(E) section 12 of the Marihuana Tax Act of 1937 (50 Stat. 556); or

(F) section 2557(b)(1) or 2596 of the Internal Revenue Code of 1939.

(2) Procedure.—after conviction (but before pronouncement of sentence) of any offense the penalty for which is provided in subsection (a) or (b) of this section, subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, the court shall be advised by the United States attorney whether the conviction is the

offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in subsection (a) or (b) of this section, subsection (c) or (h) of such section 2, or such Act of July 11, 1941, as amended, as the case may be.

(d) No suspension of sentence; no probation: etc.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of Title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

(e) Unlawful disclosure of information on returns and order forms.—Any person who shall disclose the information contained in the statements or returns required un-

der section 4732(b) or 4754(a), in the duplicate order forms required under section 4705(e), or in the order forms or copies thereof referred to in section 4742(d), except—

(1) as expressly provided in section 4773,

(2) for the purpose of enforcing any law of the United States relating to narcotic drugs or marihuana, or

(3) for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana,

shall be fined not more than $2,000 or imprisoned not more than 5 years or both.

Title 47, Section 605, U. S. Codes:

"605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisted in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being author-

ized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Brief Statement of Facts.

Donald Sussman was a narcotic addict and a seller of narcotics [R. T. 436].

He had a conversation with Mr. Marchese in the fall of 1957 in which he told Mr. Marchese he had the habit real bad and asked Mr. Marchese to put him in a sanitarium and find a doctor [R. T. 451].

Mr. Marchese said he would talk to a doctor and try to get tablets that would help him stop the habit [R. T. 542]. He also said that he would see what he could do about a doctor. Mr. Marchese said he knew a qualified doctor in

Mexico that might be able to give him a cure [R. T. 453] and he suggested that Sussman take his wife and children and go to Mexico for the cure, which Sussman did, near Rosarita Beach [R. T. 453]. He consulted a doctor but the cure was not successful. He came back and told Marchese that he was down to a little more than one shot a day [R. T. 454] and Marchese told him to keep up the attempt to cure himself and he should not go back [R. T. 454], but he told Marchese that he was afraid that the Probation Officer would see marks and revoke his probation [R. T. 455].

Sussman knew both the defendants about seven and a half years [R. T. 360]. January 29, 1958, he was arrested by federal narcotics agents [R. T. 360]. They had a conversation with him in the office of the federal building on January 30 and the next day made arrangements to meet him and pursuant to this conversation he placed a telephone call to Mr. Marchese [R. T. 360]. At that time, and at the time of his testimony, he was under the influence of narcotics [R. T. 363]. He was using between three and four grams a day [R. T. 363]. After the phone call he was given a radio transmitter which was placed on his person [R. T. 365] and he went to an apartment at 1032 Moorpark Avenue and in the room was another person named Helen Nichols [R. T. 367] (indicating a young lady in the courtroom). He then claimed to have a conversation with the appellant Marchese in which he said to him that he had a customer that would be interested in a thousand dollars worth of narcotics if he liked the sample [R. T. 368].

Sussman then claimed to have arranged on three different occasions for purchases of narcotics, with government furnished money, which form the basis of the ten

counts—one of conspiracy, and nine of substantive offenses, with Marchese. The narcotics were allegedly placed at certain locations where Sussman, accompanied by narcotics agents, went on the three different dates, January 30, February 7, and March 13, 1958 [R. T. 367-403].

At one time the witness Sussman was in the bookie business [R. T. 408]. Sussman had been using narcotics for four and one-half years [R. T. 410]. On cross-examination the witness didn't remember Marchese's house number. He got mixed up on the phone number [R. T. 415] and admitted he had gone over his statement before testifying [R. T. 414]. Immediately after he was arrested he knew that if he gave the government agents some information about anybody that he would probably be able to get a lighter sentence [R. T. 419]. He was taking narcotics off of the top of narcotics and replacing it with sugar [R. T. 422].

He was informed that the recording device that was on his person would record what he was saying [R. T. 425] and they would take it down later and they wanted him to sign it after he heard the statements taken off the recorder [R. T. 425]. Each time he made a call there was an agent with him. The electronic apparatus was attached with the transmitter on each of the days that he allegedly saw Marchese—January 30th, February 7th and March 12th, and later he changed it to the 31st [R. T. 475]. He had a shot of heroin on the 31st after he got home [R. T. 476].

Malcolm P. Richards testified that he was one of the arresting officers and that he had arrested Mr. Sussman, and that he was acquainted with William C. Gilkey, another narcotics officer [R. T. 93], and that Mr. Sussman

was a user of narcotics and had been convicted in the State court for the use of narcotics [R. T. 94]; he had been with Sussman quite a number of times from January 30th to March 13th [R. T. 95]; he knew that Sussman was sentenced to the Federal Penitentiary for violation of the federal laws; he didn't know how often Sussman used heroin, and he only looked at Sussman's arms about once and he saw a couple of fresh needle marks on his arms. He also knew that Sussman sold narcotics [R. T. 96], and that Judge Byrne imposed two years upon him and recommended that he be sent to a hospital for treatment for his addiction. He was with Sussman on an average of twice a week. He placed the Schmidt radio on the person of Sussman [R. T. 101], between his pants and his skin. The radio has a radius of about three or four blocks [R. T. 102]. He had been reconnoitering the premises, and each time that he used the Schmidt transmitter he parked in the same place. He could not see the front door or entrance to Apartment No. 5 at the position where he parked [R. T. 104], which was the residence of the appellant Michele Marchese. On all occasions he was with Deputy Farrington of the Sheriff's Narcotic Detail, and on one occasion he was with both Farrington and Gilkey, Gilkey being another narcotics agent. This was on the morning of January 31st. At that time he did not make arrangements to pay Sussman money, but he did pay him in excess of $600 [R. T. 107]. It was money furnished by the government. He was the senior officer; he discussed with Sussman the way to operate and to conduct the investigation. He told Sussman to go over and talk with the defendant Marchese, and that "we want to purchase a thousand dollars worth of heroin" [R. T. 109]. He talked with the defendant Marchese at the time he was arrested

March 13th. There were several other officers present. He did not ask him anything about narcotics on that occasion [R. T. 111].

William C. Gilkey, another narcotics officer, testified that on January 30th he, along with other officers, about 10 o'clock in the morning, met Danny Sussman at a parking lot located on Sunset and LaBrea, at which time the Schmidt device was put on Sussman's person. Sussman was searched, his automobile was searched, and he was then followed away from the area by the officers. Sergeant Landry and Officer Gilkey followed Sussman to the vicinity of 11032 Moorpark, apartment 5, where appellant Marchese lived [R. T. 127-128]. They parked their automobile, and he saw Sussman enter the apartment, No. 5, shortly after 12 o'clock. He saw a 1957 Chrysler parked behind Sussman's automobile. Sussman parked in front of the 1957 Chrysler. In about ten minutes, he saw Sussman leave the apartment, re-enter his automobile and drive away. He was met in the vicinity by Agent Richards and Deputy Farrington and Deputy Gillette. Shortly thereafter Sergeant Landry and Gilkey drove to the vicinity of Third and Normandie Avenue. Shortly after they arrived, Agent Abe entered the men's rest room of a Mobil service station and made a search of the rest room. He didn't find anything [R. T. 129]. He left the rest room. At about 1:40, he observed a 1956 green and white Buick drive into the service station and park at the pump. The occupant left the automobile, entered the men's rest room, stayed a short time, and left. The man he saw enter the rest room he identified to be the defendant Del Bono [R. T. 130]. The evidence was admitted against Del Bono only [R. T. 131]. Gilkey again went into the rest room and again made a search and noticed wedged between

the wall and the rear part of the face bowl a group of white napkins which contained a bulk substance. He tore a piece of napkin, or the outer wrapping from the napkin in order to identify that same package at a later date. It was Exhibit 6 [R. T. 131]. He initialed it. He had a conversation with the officers, and left the area. He drove to Wilshire Boulevard, just east of Western Avenue, and parked in front of Ollie Hammond's Steak House. He observed parked in front of Ollie Hammond's Steak House the same vehicle which had driven into the service station on Third and Normandie, to wit, the green and white Buick [R. T. 136]. About 6:30, he, along with other officers, met Sussman at the parking lot of the Safeway Store at Sunset and LaBrea, at which time Sussman, along with Agent Richards, made a telephone call. On January 31st, he again went along with the other officers, at which time Sussman was searched. There was nothing on his person, and Agent Richards gave him a thousand dollars, and he again saw a 1957 Chrysler. Sussman's person was searched and no narcotics were found, but he did have $110 of the money which Agent Richards had given him, the serial numbers of which had been recorded. On March 13th he conducted a further investigation, at which time Sussman's person was searched. No narcotics or any money was found on him. He was then followed to the vicinity of 11032 Moorpark by Deputy Farrington. They parked in the area, after seeing Sussman enter apartment No. 5 and remain there for about 20 minutes. They observed him leave the area, that is, Sussman, followed by Marchese in a 1957 Buick [R. T. 140]. They drove to Laurel Canyon and Moorpark where they were separated from Sussman. They drove back to Sunset and LaBrea and remained there for about 20 or 30 minutes, and met the other agents.

The other agents related similar testimony about seeing Sussman, observing him wired for the use of the radio transmitter, and their observations of his having entered the apartment of Marchese and of having left, and of having followed him to various places charged by the government to be meeting places, and to having made various observations, which are set forth in the transcript, other than the production of the narcotics which Sussman had previously acquired and had allegedly sold, and the Agent Richards testified to having overheard a telephone conversation between Sussman and Marchese.

The appellant, Michele Marchese, was convicted of ten counts of violation of the narcotic laws and sentenced to ten years' imprisonment. Jesse Del Bono was found guilty of four counts and sentenced to ten years' imprisonment.

Donald Sussman, an admitted long-time narcotic user and pusher, was arrested both by the state and federal authorities on a charge of violating the narcotic laws. He was promised consideration if he collaborated with the narcotic officers, who then not only used him but placed him on the payroll, paying him every week until more than $600 was paid to him. He was the principal witness for the government. They equipped Sussman with radio equipment known as the Mitchell receiver, which has a radius of about four blocks, then proceeded to send him to the appellant, Marchese, on three different dates when it is claimed they heard conversations of Sussman with Marchese and in which there were negotiations for the purchase of narcotics. Not only was the Mitchell receiver used, but the telephone was also used between Sussman and Marchese. Petitioner contends both are forbidden by statutes of Congress and that evidence thus obtained is illegal and not properly admissible in evidence.

Marchese had previously sought to help Sussman break the narcotic habit, had advised him to take a narcotic cure, had sent him into Mexico and had otherwise befriended him in the hope of having him get cured of the use of narcotics. It was this benefactor of Sussman upon whom the government turned to send Sussman in an endeavor to make a case against Petitioner Marchese. Under the doctrine of *Sherman v. United States,* 356 U. S. 369, petitioner contends this was entrapment as a matter of law.

Questions Presented by This Writ.

1. Whether the facts of this case make it entrapment as a matter of law under the authority of *Sherman v. United States,* 356 U. S. 369, 2 L. Ed. 848, and whether the opinion of the Court below is therefore in conflict with the opinion of this Honorable Court.

2. Whether the use of the Schmidt recorder and transmitter and the information obtained thereby is forbidden by section 605, Title 47, U. S. Codes and the Fourth and Fifth Amendments, United States Constitution. Whether the use of such instrument and the fraudulent misrepresentations made in connection therewith violate due process of law guaranteed by the Fifth Amendment, United States Constitution,

3. Whether there was an unlawful use of the telephone by Sussman and the narcotic agents in violation of Title 18, section 1403, U. S. Codes, thereby requiring exclusion of the evidence and reversal of the judgments. Whether the use of such evidence violates fair trial under due process of law guaranteed by the Fifth Amendment, United States Constitution.

4. Whether this court should re-examine and redetermine its majority opinion in the case of *On Lee v. United*

States, 343 U. S. 747, 96 L. Ed. 1270, and adopt the minority opinion of that case.

5. Whether the verdicts and judgments are contrary to the law and the evidence.

6. Whether the acquittal of Del Bono of six counts requires reversal of the judgments as to the petitioner on those six counts.

Reasons for Granting the Writ.

1. This case involves important questions of criminal law which have not been but should be decided by this Honorable Court, to wit, the interpretation of section 1403 of Title 18 forbidding any person from using telephonic communications, without exception, and whether the use of evidence obtained in this way is illegally obtained evidence in violation of section 1403 of Title 18, and the rule of exclusion of illegally obtained evidence and section 605 of Title 47, and the Fifth Amendment to the Constitution of the United States.

It will be noted that Title 18, Section 1403, U. S. Codes, forbids every person from using telephones or telephonic communications for the purpose of sale, transfer or handling of narcotics. There is no exemption in the statute for someone like Donald Sussman to use the telephone and thus to use the means of communication in the operation that was herein engaged in or claimed to have been engaged in by him.

Thus at the instance of the government, Donald Sussman, an admitted narcotic user and pusher of narcotics, not only became a government employee but nearly all of the transactions were arranged for through the use of the telephone. The evidence thus arranged for and obtained and testified to at different times throughout the trial is

as equally objectionable as a confession obtained in violation of Rule 5(b), Rules of Procedure for the District Courts of the United States and as equally objectionable as confessions obtained prior to arraignment in the District Courts and should nullify the judgments in this case as being the use of evidence obtained by improper standards for the enforcement of criminal law in the federal courts.

McNabb v. United States, 318 U. S. 332, 341, 87 L. Ed. 819;

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716.

Mr. Justice Douglas, in *Sherman v. United States*, 356 U. S. 369, quoting Mr. Justice Holmes in *Olmstead v. United States*, 277 U. S. 438, 470, 72 L. Ed. 944, 952, said:

> " 'It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which evidence is to be obtained . . . for my part I think it less evil that some criminals should escape than that the government should play an ignoble part.' Insofar as they are used as instrumentalities in the administration of criminal justice the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and refuse to sustain such methods by effectuating them."

The use of such evidence, therefore, obtained illegally in violation of section 1403 of Title 18, is the use by the federal courts of illegally obtained evidence in violation of that section.

This presents an important question of criminal law and the supervisory power of this Court over criminal justice

which has not been but should be passed upon by this Honorable Court.

Congress, in passing Title 18, section 1403, made every person who uses any means of communication in the furtherance of any narcotic violation liable for criminal penalties (Narcotic Control Act of 1956). From the legislative history of the Act, Vol. 2, page 3302, it appears that there was an effort made by the congressional subcommittee to authorize the interception and admission in evidence of telephone communications in narcotic cases under court order, but this effort failed and was not incorporated in the Act. Therefore, congress did not permit or authorize, but specifically forbade, any use of the telephone in connection with such alleged conduct into evidence.

The narcotic officers were, therefore, not authorized to furnish money to Sussman and to direct him to use the telephone while they listened in the continued furtherance of each of the transactions as alleged in the indictment and involved in this case. Without such telephonic communication, without such use of the telephone as forbidden by section 1403 of Title 18, and without the admission in evidence of the telephonic communications, the government's case would necessarily fail and fall. The question presented here is one of great importance in the administration of criminal justice and in the supervisory capacity which this Court has in criminal cases and in the rules of evidence governing criminal cases in this country. We therefore urge this Court to grant certiorari upon the important ground presented by this question.

2. The appellant was entrapped as a matter of law and the decision below is therefore in conflict with the decision of this Honorable Court in *Sherman v. United States*, 356 U. S. 369, 2 L. Ed. 2d 848.

If the government's case is to be believed, then one Donald Sussman, a narcotics peddler and pusher of narcotics, became a government employee for the purpose of entrapping the appellant. Sussman was a well-known addict, as well as a pusher. Even at the time of his operations in this case, he was using 3 to 4 grams of heroin daily and was under its influence and had been for a year prior thereto without any interruption by the federal narcotics officers [R. T. 363]. They sent him to see the appellant, who had tried to help him out to the extent of having sent him (Sussman) to be cured by sending him to Mexico. He borrowed money from Marchese from time to time and used to go to the apartment to borrow money from him [R. T. 481]. He was given $500.00 to $600.00 by the narcotics agents in cash to pay for his efforts to frame Marchese.

The evidence in this case was that the idea and effort to get the narcotics first arose in the mind of the federal officers and not in the mind of the defendant. They supplied Sussman with money and apparently allowed him to use narcotics to carry out the scheme of entrapping the appellant into the claimed negotiations, if they did occur. For the purpose of the argument only, we assume that they occurred, because at no time did any officers or any one find any narcotics on the person of the appellant. At no time did they find any of the money which they gave to Sussman in the possession of the appellant. At no time did they find the appellant engaged in any other transaction or discussions than that with Sussman. If the idea of getting narcotics arose in the minds of the officers, then they operated through Sussman, a friend of the appellant, there was entrapment as a matter of law, and the principle enunciated in *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, should apply, where the court

said that the issue of entrapment may be raised at any stage of the case. As stated in *Sherman v. United States, supra,*

> "However, 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' (*Sorrells v. United States,* 287 U. S. 435, 77 L. ed. 413.) 287 US, at 442."

As stated in *Sherman v. United States,* there is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. (*Sherman v. United States,* 356 U. S. 269, at 375.)

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." (*Sherman v. United States,* 356 U. S. 369, at 376.)

> "The first case in which a federal court clearly recognized and sustained a claim of entrapment by government officers, as a defense to an indictment was, apparently, Woo Wai v. United States (C. A. 9 Cal) 223 F. 412." (*Sherman v. United States,* 356 U. S. 369, at 378.)

"As Mr. Justice Holmes said in Olmstead v. United States, 277 U. S. 438, 470, 72 L. ed. 944, 952, 48 S. Ct. 564, 66 ALR 376 (dissenting), in another connection, 'It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . [F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.' Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts.' McNabb v. United States, 318 U. S. 352, 341, 87 L. ed. 319, 324, 63 S. Ct. 608, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice upon which ultimately depends the rule of law, in the transcending value at stake." (*Sherman v. United States*, 356 U. S. 369, at 380.)

3. This Court is asked to reexamine its majority decision in *On Lee v. United States*, 343 U. S. 747, 96 L. Ed. 1270, and to examine the facts in this case in the light of the opinion written by Mr. Justice Douglas in that case.

The appellant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The use of the recording device on the person of Sussman was in violation of the Fourth Amendment to the Constitution of the United States and as such was also in violation of the Fifth Amendment to the Constitution of the United States since it constituted trespassing and illegal search or seizure.

The planting of the Schmidt recorder on Sussman with instructions to have him enter the apartment of the appellant for the purpose of entrapping the appellant constituted fraudulent trespass and was "dirty business." As such, it was a violation of the Fourth Amendment to the Constitution of the United States. Sussman was then an agent and officer of the United States. Protection against "invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life" is provided in the Fourth and Fifth Amendments to the Constitution of the United States. (*Boyd v. United States,* 115 U. S. 616, at 630.)

To send a paid agent into a man's home secretly wired with a recorder for the purpose of entrapping him in an unjustifiable intrusion by the government upon the privacy of the individual and violates the Fourth Amendment of the Constitution of the United States and the use as evidence in a criminal proceeding of facts obtained by such entrapment must be deemed a violation of the Fifth Amendment. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." (*Olmstead v. United States,* 277 U. S. 438, at 479, 72 L. Ed. 957.) As stated by Mr. Justice Douglas in his dissenting opinion in *On Lee v. United States,* 343 U. S. 747, 96 L. Ed. 1270, "The con-

trolling, the decisive factor in the invasion of privacy against the command of the Fourth and Fifth Amendments." In the same case, Mr. Justice Burton and Mr. Justice Frankfurter said:

> "I agree with the dissenting opinion below that what Lee overheard by means of a radio transmitter surreptitiously introduced and operating, without warrant or consent, *within* petitioner's premises, should not have been admitted in evidence. The Fourth Amendment's protection against unreasonable searches and seizures is not limited to the seizure of tangible things. It extends to intangibles, such as spoken words. In applying the exclusionary rule of Weeks v. United States, 232 U. S. 388, 58 L. ed. 652, 34 S. Ct. 341, LRA 1915B 834, Ann Cas 1915C 1177, we are primarily concerned with where and how the evidence is seized rather than what the evidence is. Cf. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. ed. 319, 40 S. Ct. 182, 24 ALR 1426; Jeffers v. United States, 342 U. S. 48, ante, 59, 72 S. Ct. 83; Nueslein v. District of Columbia, 73 App. DC 85, 115 F. 2d 690. [Paragraph] It seems clear that if federal officers without warrant or permission enter a house, under conditions amounting to unreasonable search, and there conceal themselves, the conversations they thereby overhear are inadmissible in federal criminal action. It is argued that, in the instant case, there was no illegal entry because petitioner consented to Chin Poy's presence. This overlooks the fact that Chin Poy, without warrant and without petitioner's consent, took with him the concealed radio transmitter to which agent Lee's receiving set was tuned. For these purposes, that amounted to Chin Poy surreptitiously bringing Lee

with him." (*On Lee v. United States*, 343 U. S. 747, 96 L. Ed. 1270, 1281-1282.)

We reiterate and renew the arguments made by the learned Justice Burton (Republican) and Justice Frankfurter (Democrat), concurring on the subject of illegal search and seizure—and we ask this circuit to adopt the same.

4. Another important point raised in this hearing is whether the use of evidence obtained by interception of the messages and the use of radio equipment is forbidden by section 605, Title 47, United States Codes.

Although a majority of this Court has seemingly held otherwise in *On Lee v. United States*, we ask the Court to reexamine the facts of this case in the light of its other decisions in *Nardone v. United States*, 302 U. S. 379, 308 U. S. 338, *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, *Benanti v. United States*, 355 U. S. 96, 2 L. Ed. 2d 126, and the following cases:

Weiss v. United States, 308 U. S. 321, 327;

United States v. Polakoff, 112 F. 2d 888;

James v. United States, 89 U. S. App. D. C. 201, 191 F. 2d 472;

United States v. Hill, 149 Fed. Supp. 83;

Reitmeister v. Reitmeister, 162 F. 2d 691;

Reichert v. Commissioner of Internal Revenue, 214 F. 2d 19;

United States v. Sergden, 226 F. 2d 281, (Ninth Circuit);

United States v. Lipinski, 151 Fed. Supp. 145;

United States v. Stephenson, 121 Fed. Supp. 274, 223 F. 2d 336.

5. The question of law in this case is also raised as to the weight to be given to a narcotic addict and a self-confessed accomplice and whether that constitutes substantial evidence as a matter of law. This case must rest or fall upon Sussman's testimony.

Each of the verdicts as to Counts 2, 3, 4, 5 and 6 by the jury found Del Bono not guilty. Since, however, the alleged delivery on which the government relies and proof of the receipt of narcotic drugs by Sussman require necessarily proof that Marchese transported or arranged to transport the drugs to a place where Sussman claimed to have agreed to have it picked up, the findings of the jury as to each of those counts necessarily finds that Marchese did not have the drugs which Sussman claims to have placed in the various spots where Sussman was supposed to pick them up.

The evidence is entirely absent of any proof other than that of the witness Sussman that Marchese, or for that matter Del Bono, at any time had possession of any of the narcotics in question or that they had any of the marked money which the government furnished to make the purchase and easily identified or that they at any time had any possession or had received or concealed or facilitated the receipt or sale of any narcotics.

As to Counts 7, 8, 9 and 10, these charged as follows: Count 7 charged the receipt, concealment, facilitation and transportation of two ounces, 7 grains, of heroin on February 7, 1958, and on March 13, 1958 (Count 8) the receipt and facilitation of the sale to Sussman and Malcolm Richards of 32 ounces, 246 grains, of heroin. Count 9 charged the selling of the 32 ounces, 246 grains, of heroin to Sussman without obtaining a written order on the form issued by the Secretary of the Treasury, and Count 10

charged the receipt, facilitation and transportation of the 32 ounces, 246 grains, of heroin.

There is no evidence that the defendant Marchese induced, counseled or procured the commission of the above-described offense by instructing appellant Jesse Del Bono to transport the heroin as alleged in Count 7 [C. T. 6]. There is no evidence that Marchese ever instructed Del Bono to do anything or that he saw Del Bono and conferred with him regarding the said narcotics, and all the evidence with relation thereto rests upon speculation and conjecture. The same is true with regard to the action alleged on March 13, in Counts 8, 9 and 10. There is no evidence that Jesse Del Bono transported the narcotics in question or that the appellant Marchese had any knowledge of any transportation, if there was any, by the appellant Jesse Del Bono.

There is no evidence that either defendant ever received, incurred or had in his possession at any time, or themselves transported the narcotics in question. The case must rest therefore on pure speculation and conjecture. Although narcotics officers observed the apartment of the appellant Marchese at No. 5, 11032 Moorpark, North Hollywood, California, Del Bono was not observed to be going there and was not observed to participate in any way in any narcotic transaction, and there is only one occasion when Del Bono was seen with, or talking to, the appellant Marchese.

In *Sykes v. United States*, 204 Fed. 909, the Circuit Court of Appeals (Eighth Circuit) held that the testimony of an accomplice alone is not sufficient to establish the guilt of the accused.

Wharton in the ninth edition of his work on Criminal Evidence, in section 442, says:

> "The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the offense were enough, a party, who on the case against him would have no hope of an escape, could, by his mere oath, transfer to another the conviction hanging over himself."

A demonstration by reason and authority that this is the just and rational rule may be found in *State v. Chyo Chiagk*, 92 Mo. 415, 417, 4 S. W. 704. To the same effect are *United States v. Ybanez* (C. C.), 53 Fed. 536, 540; *Commonwealth v. Hayes*, 140 Mass. 366, 369; *Commonwealth v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391; *McNeally v. State*, 5 Wyo. 59, 68, 36 Pac. 824.

In *Sykes v. United States, supra*, it states:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' *Holmgen v. United States*, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contadicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another

was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke v. State*, 68 Neb. 154, 104 N. W. 154, 158."

It is respectfully submitted that the testimony of Sussman, the confessed perpetrator of narcotic offenses, is not substantial evidence without some corroboration to the person of the accused.

Such corroboration to the person of the accused could be:

a. The finding of narcotics of a similar kind or character in the possession of the defendants, or either of them. None was found.

b. The finding of some of the money which the government claimed to have given Sussman and the numbers of which were known to the government (the money was, in effect, marked money) upon the person of either Marchese or Del Bono.

c. The finding of any bag of a similar kind or character to the brown bags or conveyances that were used and were claimed to be the mediums in which the narcotics were placed.

d. The recordings which the government claims to have which they asserted were the source and basis of their information, but which were never produced in court, either in full or in substance, notwithstanding the demands of counsel for Del Bono, after Sussman had claimed to have approved the contents of recordings each time after they were allegedly taken.

The case presenting important questions of criminal law, one of which has not heretofore been decided by this

Honorable Court, and others which require the supervisory opinion of this Honorable Court in criminal matters, we respectfully submit require the Court to grant certiorari in this case.

WHEREFORE petitioner Michele Marchese prays that this Court grant certiorari and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

Michele Marchese & Jesse Del Bono, Appellants, vs. United States of America, Appellee. No. 16151.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

The judgment of the United States District Court for the Southern District of California is affirmed.

The order admitting defendants to bail is revoked effective immediately. This order of revocation is without prejudice to the defendants moving in the district court for bail in the light of the changed circumstances of affirmance. In the present condition of the case, this court deems existing bail too low.

RICHARD H. CHAMBERS,
STANLEY N. BARNES,
GILBERT H. JERTBERG,
United States Circuit Judges.

(Endorsed)

Filed Apr. 15, 1959

Paul P. O'Brien,
Clerk

A True Copy,

Attest: Apr. 15, 1959
Paul P. O'Brien,

Paul P. O'Brien,
Clerk.